No. 13713

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GOLDEN GRAIN MACARONI COMPANY, INC., a Corporation, and PASKEY DEDOMENICO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE EDWARD P. MURPHY, *Judge*

APPELLEE'S BRIEF

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

CASES

Page

Page

STATUTES

MISCELLANEOUS

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APPELLEE'S BRIEF

I

STATEMENT OF JURISDICTION

Pursuant to 21 U.S.C. 331(a), 21 U.S.C. 333(a), and 18 U.S.C. 3231, the District Court has jurisdiction to try the defendants-appellants.

Under 28 U.S.C. 1291, this Court has authority to review the judgments of the District Court.

II

STATEMENT OF FACTS

The six-count Indictment[1] in this case charged the defendants, Golden Grain Macaroni Company, Inc., and Paskey Dedomenico, with violating the Federal Food, Drug, and Cosmetic Act by causing adulterated foods to be introduced into interstate commerce. (R. 3-12). More specifically, the Indictment charged that the foods involved consisted in part of a filthy substance such as insect larvae or insect fragments [21, U.S.C. 342(a) (3)], and had been prepared, packed, and held under insanitary conditions whereby they may have become contaminated with filth [21 U.S.C. 342(a) (4)].

The Golden Grain Macaroni Company is a corporation organized under the laws of the State of California, doing business at Seattle, Washington. (R. 23). Paskey Dedomenico is president of this corporation and general manager of its Seattle plant. (R. 23, 284).

Golden Grain manufactures and sells cut macaroni, elbow macaroni, spaghetti, thin spaghetti, and

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[1] Since the trial court found each of the defendants *not guilty* as to Count 1, and guilty as to the remaining Counts (R. 13, 15), we shall consider only Counts 2-6 in this brief.

other similar products. The evidence established, and it is now conceded, that both defendants were responsible for each of the interstate shipments of food as alleged in Counts 2-6. (Appellants' Br. 2-3).[2]

Food and drug inspectors obtained samples from each of these shipments and portions of the samples were analyzed for filth content by Government witness Robert T. Elliott, chemist for the U. S. Food and Drug Administration, and by defense witness John Spinelli, chemist for the Food Chemical and Research Laboratory. (Appellants' Br. 2-3). Both chemists used the same methods of analysis, namely, those published by the Association of Official Agricultural Chemists. (R. 173-4, 233). Both chemists found insects or larva fragments and other foreign matter in each sample, though Mr. Spinelli examined smaller portions and found a numerically smaller amount of foreign material. (R. 156-160, 235-239).

The conditions of sanitation which prevailed at defendants' Seattle plant during June and July of 1951 — the period when the food in question was

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[2] However, in another portion of their brief, appellants contend that the individual defendant was away from the plant when the shipments were made and is therefore not *criminally* responsible for those acts. (Appellants' Br. 51-63). We shall discuss this point in our argument.

manufactured — were described by former and present employees of the company as well as by inspectors of the Food and Drug Administration.

Mrs. Laura Shoop had been with the firm for 7½ years, cutting and packing spaghetti. (R. 63-64). She testified that a great many times she observed insects such as moths, millers, and little worms on the noodle-drying trays and in the spaghetti-drying room. (R. 65, 67). While the firm used spraying methods to attempt to control the insects, she didn't think "they ever got those little worms down around the edges" of the trays. (R. 67). On cross-examination, when asked how many moths she saw in June and July of 1951, she testified she had seen "a big lot of them" and that "nearly everything you turned over you could find some of them." (R. 69). When she reported the presence of the moths to the foreman, Mr. Mulvaney, "he wouldn't do anything as a rule." (R. 70). Also on cross-examination, when asked whether she would say the plant was unsanitary in June and July of 1951, she said, "Oh yes," basing her answer on the presence of the moths. (R. 71).

Mrs. Colleen Dicecco worked for the Golden Grain Macaroni for a few months in 1951, leaving the end of June or the beginning of July. (R. 106). In describing her duties, she testified: "We had to pack

macaroni and the macaroni and spaghetti that fell on the floor we had to pick up and put back into the machine and pack that too." (R. 106).

Food and Drug Inspectors, Fred Shallit and Horace A. Allen, inspected the Seattle plant of the Golden Grain Macaroni Company on July 18 and 19, 1951, and on July 31, 1951. (R. 78, 112). On arriving at the plant on July 18, they spoke to the receptionist, identifying themselves and asking for Paskey Dedomenico. She stated Mr. Dedomenico was in California. When Mr. Shallit requested permission to make an inspection, the receptionist told him *"that Mr. McDiarmid was in charge of the plant, but that he wasn't in, either, but was expected down very shortly."* (R. 79). When Mr. Shallit then asked who might grant permission to make the inspection, she said she would inquire from Mr. Joe Mulvaney. She left and returned shortly informing the inspectors "that Mr. Mulvaney didn't feel that he had authority to grant * * * permission to make the inspection." (R. 80).

The inspectors then waited about 35 minutes for Mr. McDiarmid who readily granted permission to make the factory inspection.[3] (R. 80).

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[3] Appellants deny that Mr. McDiarmid had authority to grant this permission, and contend that the evidence obtained by the inspectors on July 18 and 19 was not admissible. (Appellants' Br. 8-14). We shall consider these matters in our argument.

In Mr. Shallit's extensive testimony, corroborated by that of Mr. Allen (R. 152), he meticulously described the inside appearance of the building including the flour storage bin, the conveying system, and the manufacturing and drying equipment. (R. 86-150).

Everywhere there were live or dead moths, live larvae, insect webbing, and pupae. For example, by removing the wood housing on one of the screw conveyors in the plant's conveying system which transports flour from the storage bins to the machinery, Mr. Shallit was able to count 15 live moths as well as about 50 pupae, and he also observed insect webbing and live larvae. (R. 87). This condition was photographed. (R. 88; Plaintiff's Ex. 11). In another elevator, he saw 6 live moths and 50 larvae. (R. 98). When he removed the plate cover from a section of a screw conveyor, he found 2 live moths, larvae, and insect webbing adhering to the cover, and he noted one live moth and insect webbing directly in the conveyor in contact with the flour. (R. 93). This scene was photographed. (Plaintiff's Ex. 14). When he examined the dough kneader of the noodle-manufacturing equipment, it was empty, but adhering to the grease at the bottom of the kneader were 10 dead moths. (R. 101).

On a wall within a few feet of the main flour-storage bin, there were approximately 400 moth pupae or cocoons. (R. 96; Plaintiff's Ex. 15).

In the noodle-drying room, Mr. Shallit saw one tray with noodles containing two live moths on the noodles. (R. 107-108; Plaintiff's Ex. 20). He found insect webbing in the corners of each 6 trays with noodles that he examined. (R. 109).

In the enrichment tank, where vitamin tablets are dissolved for subsequent use in the manufacture of vitamin-enriched products, Mr. Shallit detected 4 dead moths in a yellowish liquid at the bottom of the tank. (R. 103; Plaintiff's Ex. 18).

During the inspection of July 18 and 19, Mr. Shallit obtained physical specimens of moths, larvae, webbing, etc., taken from various parts of the plant and its equipment. These are in evidence. (Plaintiff's Ex. 21-26). In his testimony, Mr. Shallit explained the source of each such specimen. (R. 115-118).

On July 31, 1951, Mr. Shallit and Mr. Allen re-visited the plant. (R. 112). Mr. Dedomenico was present; they spoke to him for about an hour, telling him of their findings on the previous inspection of July 18 and 19. (R. 112). When they asked for permission to make another inspection, Mr. Dedomenico told them to go ahead and make it. (R. 113). The

inspectors then examined the plant and its equipment again though not in as much detail as before. (R. 114). There were still live moths present, together with insect webbing, dead moths, and larvae, but the evidence of insect filth was not as impressive as on the previous inspection. (R. 114).

The moth problem encountered by the inspectors on July 18 and 19 had existed for some period prior to that time because it takes a period of about 9 weeks for flour moths to pass through the life cycle from egg to adult. (R. 140-141); Defendants' Ex. A-2, p. 4). Mr. Shallit counted approximately 100 or more adult moths in the plant. (R. 141).

One of the witnesses called by the defense was Joseph W. Mulvaney, foreman of the plant for 6 years. He agreed that the flour moth "is the big problem." (R. 204). Live moths were always present, sometimes worse than others. (R. 213). He was with the inspectors part of the time on July 18 and 19, and in view of their findings he agreed with their suggestion that the flour-conveying system should be cleaned before being used again. (R. 212, 113). The mass of cocoons on the wall (Plaintiff's Ex. 15) was "quite visible" to him. (R. 212).

Defendants waived a jury and were tried by the District Court. (R. 307). On December 8, 1952, the

Court entered a judgment for each defendant, finding each defendant not guilty as to Count 1 but guilty as to Counts 2, 3, 4, 5, and 6. (R. 13-16). The corporate defendant was sentenced[4] to pay a fine of $5,000. (R. 14). The individual defendant was sentenced to pay a fine of $5,000, and the Court suspended the imposition of sentence as to imprisonment on Counts 2, 3, 4, 5, and 6 for a three-year period of probation. (R. 15-16).

On January 13, 1953, the District Court filed an Order Denying Motion for New Trial. (R. 308). On January 14, 1953, both defendants filed a Notice of Appeal. (R. 17). On motion of appellants, the District Court issued an Order to Stay Execution of the judgments during the pendency of this appeal. (R. 20).

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[4] Both defendants had been convicted of prior violations of the Federal Food, Drug, and Cosmetic Act (R. 180-181; Plaintiff's Ex. 27), and were therefore subject to the heavier penalties provided for by 21 U.S.C. 333(a).

III

STATUTORY PROVISIONS INVOLVED

FEDERAL FOOD, DRUG, AND COSMETIC ACT:

"21 U.S.C. 342. Adulterated Food

"A food shall be deemed to be adulterated—

"(a)(3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food; or

"(a)(4) if it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health;"

"21 U.S.C. 331. Prohibited Acts

"The following acts and the causing thereof are hereby prohibited:

"(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded."

"21 U.S.C. 333. Penalties—Violation of Section 331

"(a) Any person who violates any of the provisions of section 331 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to impris-

onment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine."

"21 U.S.C. 372. Examinations and Investigations — Authority to Conduct

"(a) The Secretary is authorized to conduct examinations and investigations for the purposes of this chapter through officers and employees of the Department or through any health, food, or drug officer or employee of any State, Territory, or political subdivision thereof, duly commissioned by the Secretary as an officer of the Department * * *"

"21 U.S.C. 374. Factory Inspection

"For purposes of enforcement of this chapter, officers or employees duly designated by the Secretary, after first making request and obtaining permission of the owner, operator, or custodian thereof, are authorized (1) to enter, at reasonable times, any factory, warehouse, or establishment in which food, drugs, devices, or cosmetics are manufactured, processed, packed, or held, for introduction into interstate commerce * * *; and (2) to inspect, at reasonable times, such factory, warehouse, establishment, or vehicle and all pertinent equipment, finished and unfinished materials, containers, and labeling therein."

IV

QUESTIONS PRESENTED

(1) Is there substantial evidence in the record to support the judgments of the District Courts?

(2) Was the evidence of moth infestation and

other insanitation at defendants' plant admissible?

(3) Is that section of the Federal Food, Drug, and Cosmetic Act void for uncertainty which declares a food to be adulterated if it is prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth?

V

SUMMARY OF ARGUMENT

A. THE JUDGMENTS OF THE DISTRICT COURT MUST BE SUSTAINED IF THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THEM

Appellants challenge the sufficiency of the evidence upon which they were convicted. This Court will not reweigh the evidence, and the judgments of the trial court must be sustained if there is substantial evidence to support them, taking the view most favorable to the Government.

B. THE EVIDENCE WHICH SUPPORTS THE JUDGMENTS OF THE DISTRICT COURT IS NOT ONLY SUBSTANTIAL BUT OVERWHELMING

The judgments of the trial court are supported by substantial evidence of the most compelling character.

Mr. Robert T. Elliott, a chemist called by the

Government, has had extensive experience in the examination of foods for filth. He analyzed samples of each of the foods in question and found them all to be seriously contaminated with filth such as larvae or insect fragments, moth scales, larva capsules, etc.

Mr. John Spinelli, a chemist who testified for the defense, found insect fragments in each of the samples. He also found several pieces of larvae in one sample, mold in another, and a moth scale or part of a moth in a third.

The word "filthy" as used in 21 U.S.C. 342(a)(3) has its usual and ordinary meaning rather than any scientific or medical definition. A food may be deemed to contain a "filthy" substance if the presence of that substance in the food makes the thought of eating such food disgusting to the ordinary American consumer.

Where the Government alleges that a food is adulterated within the meaning of 21 U.S.C. 342(a)(3) by reason of the presence of a filthy substance, it is not incumbent upon the Government to prove that the product is "unfit for food" or "injurious to health."

One of the objectives of 21 U.S.C. 342(a)(3) is to protect the aesthetic tastes and sensibilities of the consuming public.

Where a food is alleged to be adulterated in more than one respect, proof that it is adulterated in *any one* respect is sufficient to sustain a conviction. Hence, the judgments of the District Court could rest upon the showing that filthy substances were present in violation of 21 U.S.C. 342(a)(3).

But there is also substantial and impressive evidence that each food was prepared, packed, and held under insanitary conditions whereby it may have [and actually did] become contaminated with filth—and was consequently adulterated in violation of 21 U.S.C. 342(a)(4).

C. THE EVIDENCE OF INSANITATION AT FACTORY WAS ADMISSIBLE

Testimony as to insanitary conditions at defendants' factory was elicited from witnesses produced by both sides, including present and former employees of defendants as well as food and drug inspectors.

Appellants object to the admissibility of part of the inspectors' testimony on the ground that permission to inspect was not granted by the "custodian" of the plant. But the trial court held on the basis of substantial evidence that the person who granted permission *was* the "custodian."

Moreover, it is our position that the factory in-

spection evidence was obtained freely and voluntarily with the permission of a responsible representative of the firm held out as "in charge of the plant" in the absence of the general manager. It is immaterial whether that representative was the "custodian" within the meaning of 21 U.S.C. 374 or not.

Under 21 U.S.C. 372(a), the Secretary of the Department of Health, Education, and Welfare has broad authority to conduct examinations and investigations. Any information that is obtained in the course of such an investigation without fraudulent or other improper methods is admissible in any enforcement action under the Federal Food, Drug, and Cosmetic Act.

A Corporation has no privilege against self-incrimination.

There was a substantial and reasonable basis for the trial court's conclusion that insanitary conditions prevailed at the plant in June and July of 1951, and may well have contaminated the products in question with filth.

D. 21 U.S.C. 342(a)(4), WHICH DECLARES A FOOD TO BE ADULTERATED IF IT IS PREPARED, PACKED, OR HELD UNDER INSANITARY CONDITIONS WHEREBY IT MAY HAVE BECOME CONTAMINATED WITH FILTH, IS NOT VOID FOR UNCERTAINTY

Appellants challenge the constitutionality of Section 342(a) (4). This issue was neither presented to nor passed upon by the trial court. Such questions will ordinarily not be considered on appeal.

The Court of Appeals for the Eighth Circuit has recently sustained the constitutionality of this Section in an exhaustive opinion which considered and rejected arguments similar to those here advanced.

E. MISCELLANEOUS POINTS

1. The Individual Defendant Was Criminally Responsible

The individual defendant was president of the corporation and in over-all charge of the plant. While he was away from the plant during some of the times in question, he was present when one of the foods was manufactured and packed, and when two others were shipped.

The criminal responsibility of a corporate officer or general manager of a firm under the Federal Food, Drug, and Cosmetic Act does not hinge upon his physi-

cal presence or participation in the violative acts. Where such acts are done in the name of a corporation, the offense is committed by all who have a responsibile share in the furtherance of the transaction which the statute outlaws.

The evidence here supports the trial court's conclusion as to the criminal responsibility of the individual defendant.

2. Appellants Were Not in Double Jeopardy

Appellants argue that several of the Counts present the question of double jeopardy. This issue was not mentioned in the trial court and for that reason would ordinarily not be considered here. Moreover, the privilege against double jeopardy must be claimed seasonably. When not asserted until appeal, it is deemed waived.

Each Count involves a separate food — thus, Count 3 relates to elbow macaroni and Count 4 to spaghetti. While both foods were shipped at the same time to the same consignee, they are separate foods, and distinct evidence was required to establish the adulterated character of each.

Section 331(a) prohibits the introduction of any adulterated food into interstate commerce, not the introduction of any shipment of adulterated foods. For each separate adulterated food—e.g., elbow mac-

aroni or spaghetti—there is a separate offense, though both are part of one shipment.

3. The Fines Imposed Are Within the Statutory Limits and Not Subject to Attack on Review

Each defendant was subject to a total maximum fine of $10,000 on each of 5 counts—or $50,000. The Court imposed a fine of $5,000 on each defendant. Since these fines are within the statutory limits, no error was committed.

4. The Trial Court Committed No Error in Its Rulings on the Filth Question

Where a court believes itself to be sufficiently advised as to the law, it has the right to refuse to hear counsel further on questions of law.

VI

ARGUMENT

A. THE JUDGMENTS OF THE DISTRICT COURT MUST BE SUSTAINED IF THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THEM

The appellants were tried and convicted by the District Court sitting without a jury. Appellants now challenge the sufficiency of the evidence upon which they were convicted. Under such circumstances, the function of the Appellate Court is clear.

"It is not for us to weigh the evidence or to de-

> termine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it."
> *Glasser v. United States* (1942), 315 U.S. 60, 80; *Woodard Laboratories, Inc., et al. v. United States* (C.A. 9, 1952), 198 F. (2d) 995, 998.

In *Henderson v. United States* (C.A. 9, 1944), 143 F. (2d) 681, this Court said at page 682:

> "It is a familiar principle, which it is our duty to apply, that an appellate court will indulge all reasonable presumptions in support of the rulings of a trial court and therefore that it will draw all inferences permissible from the record, and in determining whether evidence is sufficient to sustain a conviction, will consider the evidence most favorably to the prosecution * * *"

While appellants are aware of the existence of these rules governing appellate review (Appellants' Br. 29), the entire tenor of their brief insofar as it deals with the facts is to the effect that this Court should reweigh the evidence and emerge with conclusions different from that of the District Court.

B. THE EVIDENCE WHICH SUPPORTS THE JUDGMENTS OF THE DISTRICT COURT IS NOT ONLY SUBSTANTIAL BUT OVERWHELMING

The judgments of the District Court, we submit, are supported by substantial evidence of the most compelling character.

Mr. Robert T. Elliott, now retired from the Government service, was a chemist with the Food and Drug Administration for 33 years; for the most part, his work related to the examination of foods. (R. 153). During the ten years preceeding his testimony, he examined an estimated 200-300 samples of products of the type here in question, each sample consisting of 1-12 units and each unit being examined separately. (R. 160-161). He found many such samples entirely free from filth, using the same methods of analysis he employed in this case. (R. 178-179).

Mr. Elliott analyzed samples taken from each of the shipments of finished products described in the Indictment (R. 154-160), and he also examined samples of the raw flour materials which had been obtained from defendants' plant. (R. 161-164; 146-150). The methods of analysis which he used are those approved and published by the Association of Official Agricultural Chemists. (R. 173-174). These same methods were employed by Mr. John Spinelli, a chemist whom defendants called as a witness. (R. 233). Mr. Spinelli had been employed as a chemist for 3½ years during which time he had made a total of about 40 determinations for filth in spaghetti and macaroni. (R. 256-257).

For the convenience of the Court, we append two

charts to show the filth findings of each chemist with respect to the samples involved in Counts 2-6. *Appendix A* relates to the determinations made by Mr. Elliott, and *Appendix B* relates to the determinations made by Mr. Spinelli. When it is considered that Mr. Spinelli used smaller portions of the samples for his analysis, it becomes apparent that his finding are not far different from those of Mr. Elliott.

All of the insect or larva fragments which Mr. Elliott found were embedded within the finished product. (R. 160). However, in one of the samples Mr. Spinelli examined, he found a "couple of pieces of larvae that were not embedded in the product" and were visible to the naked eye. (R. 235-236). Mr. Spinelli also found evidence of mold in another sample. He stated that mold should not develop if the product is in good condition. (R. 236-237).

Mr. Elliott found a substantial number of moth scales and moth fragments in each sample of finished product that he analyzed.[5] (154-160; 171-172). He found no moth evidence in the raw materials he examined. (R. 164). There is thus presented an impelling correlation between the evidence of moth infestation in the plant (described earlier in our "State-

[5] Mr. Spinelli found a moth scale in one sample and possibly some moth larva parts in another. (R. 259, 261-262).

ment of Facts") and moth contamination of the finished products, the conclusion being obvious that such products "were prepared, packed [and] held under insanitary condition whereby [they] may have [and actually did] become contaminated with filth." 21 U.S.C. 342(a)(4).

A significant bit of testimony brought out through Mr. Spinelli is the fact that the analytical procedure "digests" the internal part or soft tissues of the larva or moth. (R. 260). Consequently, while the harder fragments may be recovered and counted by the analyst, *the softer body parts which were also necessarily present in the macaroni or spaghetti are not recovered.*

At the trial of the case affirmed under the name *338 Cartons * * * of Butter v. U. S.* (C.A. 4, 1947), 165 F. (2d) 728, 731, the jury was instructed "that if it found the hard parts of an insect's body in the butter, the normal inference would be that the soft parts of the insects were also in the butter." And the Court of Appeals there sustained the judgment of the District Court that such butter could not be salvaged for human consumption by reworking it so as to remove the *hard* filthy parts. The Court noted that there "is no scientific method by which the insect fat or oil could even be detected in the finished

product since it had become amalgamated with the butter fat," and the Court also rejected the argument (at page 731) that the insect fat present in the butter after reprocessing would be so infinitesimal that it could not contaminate it. The Court observed that there is "no tolerance for filth in butter," and we might add that there is no tolerance for moth in macaroni.

The statutory provision especially applicable to the testimony of the chemists is 21 U.S.C. 342(a)(3) which declares:

> "A food shall be deemed to be adulterated if it consists in whole or in part of *any* filthy, putrid, or decomposed substance, or if it is otherwise unfit for food." (Italics added).

Appellants seem to argue that the insect fragments and other foreign material in their products were present in such small amounts as not to be within the meaning of the term "filthy substance" as used in the statute. (Appellants' Br. 36-42).

But the cases they cite actually support the Government's position. We have already discussed the case of *338 Cartons * * * Butter v. U. S.* (C.A. 4, 1947), 165 F. (2d) 728. In *Triangle Candy Co. v. U. S.*, (C.A. 9, 1944), 144 F. (2d) 195, 199-200, this Court held that the presence of two small rodent hairs in one one-pound sample, and the presence of two ro-

dent hairs and three insect larva and fragments in another three-pound sample, were sufficient to sustain a conviction as to one of the Counts. As this Court pointed out in construing a comparable provision under the predecessor Food and Drug Act of 1906—in *A. O. Andersen & Co. v. U. S.* (C.A. 9, 1922), 284 Fed. 542, 545:

> "It appeared from the cross-examination of the government witnesses that they have heretofore suffered canned salmon containing a small percentage of filthy, decomposed, or putrid matter to pass in interstate commerce unchallenged, *but there is no room for controversy over percentages under the statute itself, for it excludes all.*" (Italics added).

As appellants recognize, the word "filthy"—used in 21 U.S.C. 342(a)(3)—has been uniformly construed to have its usual and ordinary meaning rather than any scientific or medical definition. (Appellants' Br. 39). Note also *U. S. v. Roma Macaroni Factory, et al.*, (N.D. Calif., 1947), 75 F. Supp. 663, 665. The following definitions are taken from Webster's New International Dictionary (2nd Ed., Unabridged, 1948):

"filth: * * *

2. Foul matter; anything that soils or defiles disgustingly."

"filthy: * * *

1. Defiled with filth, whether material or

moral; nasty; disgustingly dirty; polluting; foul; impure * * *

2. * * * disgusting * * *"

We submit that a food may be deemed to contain a "filthy" substance if the presence of that substance in the food makes the thought of eating such food disgusting to the ordinary American consumer. We further submit that macaroni or spaghetti contains a "filthy" substance if among its ingredients are moth fragments and larvae, moth scales, the soft parts of moth bodies, etc.

Appellants attempt in yet another way to devitalize the effect of 21 U.S.C. 342(a)(3). Thus they contend that before a food which contains a filthy substance may be considered adulterated within the meaning of that section, the Government must establish that the food is "unfit for food" and is also "injurious to health." (Appellants' Br. 42-49).

Both of these contentions have been often raised and uniformly rejected. There are other subdivisions of Section 342(a) which specify as conditions of adulteration of foods that they be "deleterious," "injurious to health," "the product of a diseased animal," etc. These specified characteristics thus become essential prerequisites to be proved in cases brought under those subdivisions. But in the first clause of subdivision

(3), the ban against foods consisting in whole or in part of any filthy, putrid, or decomposed substance reveals a Congressional determination that the presence of filth, putridity, or decomposition in a food product is itself sufficient to justify the exclusion of the product from the channels of interstate commerce. That being so, it is *no part* of the Government's case to establish that a product, which is proceeded against under Section 342(a)(3), not only consists in whole or in part of a filthy, putrid, or decomposed substance, but in addition contains an amount or type of filth such as makes it unfit for food or deleterious to health. This has been the consistent interpretation of the courts. *Bruce's Juices, Inc. v. U. S.*, (C.A. 5, 1952), 194 F. (2d) 935, 936; *Salamonie Packing Co. v. U. S.*, (C.A. 8, 1948), 165 F. (2d) 205, 206, cert den. 333 U.S. 863; *U. S. v. 1851 Cartons * * * Whiting Frosted Fish*, (C.A. 10, 1945), 146 F. (2d) 760, 761; *U. S. v. 935 Cases * * * Tomato Puree*, (N.D. Ohio, 1946), 65 F. Supp. 503, 504; *U. S. v. Lazere*, (N.D. Iowa 1944), 56 F. Supp. 730, 732; *U. S. v. 184 Barrels Dried Whole Eggs*, (E.D. Wis., 1943), 53 F. Supp. 652, 656.

Noteworthy is the reliance placed by many of these courts on the views expressed by this Court in *A. O. Andersen & Co. v. U. S.*, (C.A. 9, 1922), 284 Fed. 542, 544, in similarly construing a comparable

provision under the predecessor Food and Drugs Act of 1906. Yet appellants now ask that all these cases be overruled.

The legislative history of the Federal Food, Drug, and Cosmetic Act of 1938 clearly supports our position. Section 7, Sixth, of the predecessor Food and Drugs Act of 1906, 34 Stat. 769, 21 U.S.C. (1934 ed.) 8, declared that an article of food should be deemed to be adulterated if it consisted "in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance * * *". Under the 1906 statute, the courts uniformly held that a food containing a filthy or decomposed substance was adulterated regardless of whether it was fit for human consumption or deleterious to health. *United States v. Two Hundred Cases, More or Less, of Canned Salmon,* (S.D. Tex., 1923), 289 Fed. 157, 158; *Knapp et al v. Callaway,* (S.D. N.Y., 1931), 52 F. (2d) 476, 477; *United States v. Two Hundred Cases of Adulterated Tomato Catsup,* (D. Ore., 1914), 211 Fed. 780, 782-783; *United States v. 462 Boxes of Oranges,* (D. Colo., 1918), 249 Fed. 505, 506; *United States v. 133 Cases of Tomato Paste,* (E.D. Pa., 1938), 22 F. Supp. 515. 516.

The first clause of 21 U.S.C. 342(a)(3) in the Act of 1938 follows closely the corresponding provision of the earlier statute, and it is obvious that Con-

gress intended that the provision should have the same meaning in the new law.[6] The plain inference to be drawn from this history is that the second clause of Section 342(a) (3) "or if it is otherwise unfit for food" was added to reach foods which are unfit for human consumption for reasons other than that they contain filthy, putrid or decomposed substances.[7] This, we submit, is the meaning of the word "otherwise" in the second clause. And this construction of subdivision (3) comports with and furthers the express Congressional intention to preserve in the present law the best features of the 1906 Act and at the same time to "strengthen and extend that law's protection of the consumer." S. Rep. No. 152, 75th Cong., 1st Sess., p. 1; see also H. R. Rep. No. 2139, 75th Cong., 3d Sess., p. 1; *United States v. Dotterweich*, 320 U.S.

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[6] See S. Rep. No. 361, 74th Cong., 1st Sess. p. 7: "The provisions of Section 301(a)(3) and (5) [which subsequently were incorporated into Section 402(a)] dealing with filthy food and food from diseased animals, are essentially the same as those of the present law."

[7] Examples of foods unfit for human consumption for reasons other than filth, putridity, and decomposition are potatoes with a musty taste and odor, tough fish roe, stringy asparagus, etc. *United States v. 24 Cases * * * Herring Roe*, (D. Me. 1949) 87 F. Supp. 826, and see "Otherwise Unfit for Food—a New Concept in Food Adulteration," 4 Food Drug Cosmetic Law Quarterly, December 1949, p. 552.

277, 280, 292 (1943); *U. S. v. 1851 Cartons * * * Whiting Frosted Fish*, (C.A. 10, 1945), 146 F. (2d) 760, 761.

Finally, appellants assert that it was not the Congressional intent to protect the aesthetic senses of the public by enacting Section 342(a)(3). This is contrary to the entire import of that Section and of all the cases we have just been discussing. In *U. S. v. 133 Cases of Tomato Paste.* (E.D. Pa., 1938), 22 F. Supp. 515, 516, the Court said of the comparable provision in the Act of 1906:

> "There can be no doubt that this section of the act was designed to protect the aesthetic tastes and sensibilities of the consuming public * * *"
>
> * * *
>
> "The consumer ordinarily requires no governmental aid to protect him from the use of food products the filthy adulteration of which he can see, taste, or smell. What he really needs is government protection from food products the filthy contamination of which is concealed within the product."

For these reasons, we submit that there is most substantial evidence in support of the conclusion that the articles of food in question were adulterated within the meaning of 21 U.S.C. 342(a)(3), and that there is no reversible legal flaw in the judgments of conviction thereon.

It is well established that if an article is alleged

to be adulterated or misbranded in more than one respect, proof that it is violative in any one respect is sufficient to sustain a conviction. *Goodwin et al v. U. S.*, (C.A. 6, 1924), 2 F. (2d) 200, 201; *U. S. v. One Device, Intended For Use As a Colonic Irrigator*, (C.A. 10, 1947), 160 F. (2d) 194, 200; see also *Crain v. U. S.*, 162 U.S. 625, 636 (1896); *Frederivk v. U. S.*, (C.A. 9, 1947), 163 F. (2d) 536, 544, cert. den. 332 U.S. 775. Consequently, the judgments of the District Court could rest upon the established violations of Section 342(a)*(3)* alone.

However, equally substantial and impressive is the evidence adduced to demonstrate that each shipment in Counts 2-6 was also adulterated within the meaning of 21 U.S.C. 342(a) *(4)* in that the food in question was prepared, packed, and held under insanitary conditions whereby it may have become contaminated with filth. In our "Statement of Facts", we have discussed this evidence in some detail. It is based upon the testimony of present and former employees as well as that of food and drug inspectors.

Appellants raise constitutional and other objections to the admissibility of the inspectors' testimony. We shall take up these points in subsequent parts of this brief.

C. THE EVIDENCE OF INSANITATION AT THE FACTORY WAS ADMISSIBLE

We have already shown that evidence of insanitation at appellants' plant was elicited through the testimony of present and former employees of the firm as well as through the testimony of food and drug inspectors who inspected the premises on July 18 and 19, and on July 31, 1951. (See "Statement of Facts," above.) Appellants' object only to the admissibility of *part of the inspectors' testimony*, namely that relating to their observations on July 18 and 19. (Appellants' Br. 9-14 and 27-29).

There is no objection as to the testimony of the employees or to that of the inspectors with respect to their findings on July 31 except on the ground that Section 342 (a) (4) is void for uncertainty which we shall discuss in part D of this argument. Such evidence, standing alone, we submit is sufficient to sustain conviction on the charge of adulteration under 21 U.S.C. 342 (a) (4) in Counts 2-6. But it is our position that the inspectors were properly permitted to testify regarding their visit to the plant on July 18 and 19, and that the trial court was eminently correct in overruling defendants' objections.

These objections, renewed and amplified by ap-

pellants in this Court, are based upon an invalid syllogism:

(1) The statute which was then in effect, 21 U.S.C. 374,[8] required that an inspector obtain permission from the "owner, operate, or custodian" before entering and inspecting the plant.

(2) The inspectors in this case did not obtain permission from the "owner, operator, or custodian" before making the inspection of July 18 and 19.

(3) The inspectors' "failure" to obtain permission from the "owner, operator, or custodian" precludes the admissibility of their testimony with respect to their inspection of July 18 and 19.

But the trial court ruled that Mr. McDiarmid, who was the sales manager of the Golden Grain Macaroni Company and who gave the inspectors permission to make their inspection on July 18 and 19, *was the custodian of the plant at that time.* (R. 82). Appellants say this ruling was error. (Appellants' Br. 11-14). Is there substantial evidence to support the ruling, assuming it was necessary that Mr. McDiar-

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[8] Effective August 7, 1953, this provision was amended to eliminate the need for obtaining permission and to include certain other safeguards to assure reasonableness of inspection. In *Appendix C*, we have set forth this amendment in full.

mid be the custodian if the inspectors' testimony regarding the inspection of July 18 and 19 were to be admissible?

When Inspectors Shallit and Allen arrived at the plant the morning of July 18, 1951, Mr. Shallit spoke to an office girl, identified himself as an inspector, and showed his credentials. (R. 79). Mr. Shallit's conversation with the office girl, as related by him without refutation, though the office girl was still in the employ of the defendants as a receptionist (R. 185), marks out a significant support for the Court's ruling:

> "I asked if Mr. Paskey Dedomenico was in. She said no, he wasn't in; that he was down south. I believe she said California, that he had been gone for approximately two (2) weeks and would be back shortly, within a week or so. I then requested permission to make an inspection. *She said that Mr. McDiarmid was in charge of the plant, but that he wasn't in either, but was expected down very shortly.* I asked then who might grant me permission to make the inspection. She said she would inquire from Mr. Joe Mulvaney. We waited downstairs and she reappeared a few moments later and told us that *Mr. Mulvaney didn't feel that he had authority to grant us permission to make the inspection.* She said, though, that Mr. McDiarmid would be down shortly. We thanked her and told her we would return within about a half (½) hour, which we did. We left the plant and returned approximately a half (½) hour later.
>
> "We entered the plant again the same way.

This time she said that Mr. McDiarmid had not arrived yet, but would we kindly wait in a rear office. We went to that office, and within five (5) minutes after the second visit Mr. McDiarmid did appear.

"We introduced ourselves again. *He seemed to know us.* He shook hands with each of us, very friendly. *We stated we would like to make a factory inspection. He said, "Go right ahead, boys."* I believe those were his words, and he also said that if we needed any help too, for us to let him know. (R. 79-80). (Italics added).

During one of the colloquies between defense counsel and the Court, the following remarks were made:

"THE COURT: You say McDiarmid was the sales manager?

"MR. YOTHERS: Yes, sir.

"THE COURT: Wasn't he the ranking man in charge of the plant?

"MR. YOTHERS: *He was the ranking man.* He was not in charge of the plant, your Honor. There is no testimony that he was." (R. 81). (Italics added).

Mr. Kenneth E. Monfore, Chief of the Seattle District of the Food and Drug Administration, testified regarding an administrative hearing which he held on January 17, 1952, with respect to the violations subsequently made the basis for the Indictment in this case. (R. 54 ff). Mr. Dedomenico and Mr. McDiarmid appeared at the hearing. (R. 56). Mr. Mc-

Diarmid stated at the hearing that he was sales manager of the Seattle plant and acted as manager of the plant in the absence of Mr. Dedomenico. (R. 57, 59; Plaintiff's Ex. 8, page 1, last paragraph). At the conclusion of the hearing, Mr. Monfore, in the presence of Mr. Dedomenico and Mr. McDiarmid, dictated a statement as to what they had said; he then asked them whether this statement represented a true report of the hearing and they agreed that it did. (R. 62-63). This statement is in evidence. (Plaintiff's Ex. 8). The record also shows corroborative testimony of the stenographer who took the dictation from Mr. Monfore. (R. 301-303).

Mr. McDiarmid's attempts to deny that he had made such a statement to Mr. Monfore were not very impressive (R. 186-188, 190-191), and it certainly was within the trial court's discretion to place little credence in Mr. McDiarmid's testimony.

An unexpected twist to this entire episode came near the end of the trial when Mr. Paskey Dedomenico testified on cross-examination that *he would have given the inspectors permission to inspect the plant, had he been there on July 18 and 19.* (R. 292-293). He had of course granted such permission on July 31 at the time of the second inspection. (R. 291-292).

We submit that the evidence to support the

Court's ruling that Mr. McDiarmid was the plant custodian on July 18 and 19 is not insubstantial.

Appellants cite *U. S. v. Maryland Baking Co.*, (N.D. Ga., 1948), 81 F. Supp. 560, to support their argument that Mr. McDiarmid was not the custodian. Whether Mr. McDiarmid was the custodian was a question of fact necessarily dependent upon the evidence *in the present case.* But the *Maryland Baking Co.* case was argued and considered at great length in the Court below. Clearly, it is distinguishable.

Briefly, the facts in that case were that when the inspectors came to the plant of the Maryland Baking Co., the manager, Miss Piem, was present but in conference. The inspectors then asked for the person next in authority and were directed to the plant superintendent who told them to "go ahead." The Court stated at page 562:

> "Under the evidence in this case, Miss Piem was the operator and custodian. *She was present and this was known to the agents. When present, she was the proper person* of whom to first request and obtain permission for the inspection . . ." (Italics added).

In the case at bar, Mr. Dedomenico was not present.

In appraising the fallacy in appellants' position, it is also important to note how extensive is the scope of investigational authority vested in the Secretary

of Health, Education, and Welfare[9] by the Federal Food, Drug, and Cosmetic Act. The basic provision is 21 U.S.C. 372(a) which reads in part:

> "*Secretary is authorized to conduct examinations and investigations for the purposes of this chapter through officers and employees of the Department* or through any health, food, or drug officer or employee of any State, Territory, or political subdivision thereof, duly commissioned by the Secretary as an officer of the Department." (Italics added).

In another connection, this Court has had occasion to comment on the breadth of this subsection. *Research Laboratories, Inc. v. U. S.*, (C.A. 9, 1948), 167 F. (2d) 410, 414, cert. den. 335 U.S. 843.

While 21 U.S.C. 372(a), (b), and (c), spell out the Secretary's fundamental authority to conduct investigations and examinations, there are other provisions in the law which also deal with investigations and which serve special purposes.

For example, 21 U.S.C. 373 requires that

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[9] This Act was until recently administered by the Federal Security Agency under the supervision of the Federal Security Administrator. On April 11, 1953, pursuant to Reorganization Plan No. 1 of 1953 and 67 Stat. 18, the Federal Security Agency was abolished and the Department of Health, Education, and Welfare established to administer the functions formerly in the said Agency under the supervision and direction of the Secretary of that Department. (18 Fed. Reg. 2053).

carriers engaged in interstate commerce and persons who receive foods, drugs, devices, or cosmetics in interstate commerce, permit food and drug inspectors, duly designated by the Secretary, to copy records of interstate movement. The manifest purpose that such records be made available to inspectors at reasonable times is implemented by 21 U.S.C. 331(e) which makes it a prohibited act punishable under 21 U.S.C. 333 to refuse to permit such investigation. But Section 373 does not limit the Government's source of information as to records of interstate shipment. Thus, in a seizure action, *U. S. v. 75 Cases * * * Peanut Butter*, (C.A. 4, 1944), 146 F. (2d) 124, cert. den. 324 U.S. 856, the Government's evidence regarding interstate shipment was deemed admissible though the inspector had obtained the data by inspecting the manufacturer's invoice records (with permission) rather than records of an interstate carrier. On Page 127, the Court said:

> "In connection with Section 373 of the Act, there is no ground for the application of the maxim expressio unius est exclusio alterius. *We interpret this section, rather as affording a cumulative procedure to the Government, without restricting other avenues of information.* Nor are we impressed by the statement of claimant's president (who, without any remonstrance or protest, gave Rankin free access to the invoices) that he would not have granted this access if he had not thought Rankin had a legal right to such

> access or if he had known that the information thereby gleaned might be used in subsequent libel proceedings. *Permission to inspect the invoices was still voluntary and the Government was free to use this information in the proceedings for libel.*" (Italics added).

And at page 128, the Court observed:

> "There is no legal merit in the contention that the Administration must use other and more expensive and time consuming methods of investigation *instead of using information voluntarily given* . . . The Administration is not indulging in a game of 'hide and seek'. Its efforts are expended in the protection of the public." (Italics added).

In a similar way, we submit, Section 374, as it was effective in 1951, afforded a cumulative but not an exclusive procedure for obtaining factory inspection evidence. Section 374 in conjunction with Section 331(f) delineated a special procedure intended[10] to

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[10] In *U. S. v. Cardiff*, 344 U.S. 174 (1952), affirming the decision of this Court in *Cardiff v. U. S.*, 194 F. (2d) 686, the Court ruled that under the statutory language it was not a criminal offense to refuse to grant permission for food and drug inspectors to enter and inspect a factory. But this ruling does not vitiate our argument here. It is one thing for a factory owner to be immune from criminal prosecution for refusal to grant permission to inspect. It is another for the Government to use as evidence data freely obtained in the course of a factory inspection for which permission was voluntarily given by the sales manager who was held out as "in charge of the plant" in the absence of the general manager. (R. 79).

compel the granting of permission to make factory inspections. But the general authority to investigate which stems from Section 372 permits the gathering and using of *any* information freely and voluntarily given. Where such information is obtained, as here, with the permission of a responsible representative of the firm and without any fraudulent or other improper methods, we submit it is admissible in any enforcement action where it is relevant; nor is it necessary in such case to have a meticulous determination that the person who gave the permission to inspect was the "owner, operator, or custodian."[11]

Appellants speak of Mr. McDiarmid's granting of permission as a violation of the corporation's right against self-incrimination. But it is no longer open to question that a corporation has no such privilege. *U. S. v. White*, 322 U.S. 694, 699 (1944); *Bowles v. Northwest Poultry & Dairy Products Co. et al.*, (C.A. 9, 1946), 153 F. (2d) 32, 34.

Appellants seem to argue that the factory inspection evidence, even if admissible, is not closely enough related in time to the manufacturing and shipping dates. (Appellants' Br. 27-31). The outside range of

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[11] The manifest purpose of these terms in the original section 374 was to designate who might be prosecuted under Section 331(f) for failure to grant permission.

manufacturing dates extends from June 17 through July 26; the outside range of *shipping* dates extends from July 16 through July 26. (Appellants' Br. 2-3). It was reasonable to infer that the conditions which the inspectors observed on July 18 and 19 and on July 31 had prevailed at least for many weeks. This inference is based both on the testimony of the employees of the firm regarding insanitary conditions during June and July 1951, and on defendants' own evidence showing the usual life cycle of the flour moth to be about 9 weeks. (Defendants' Ex. A-2, page 4.)

In *Triangle Candy Co. v. U. S.*, (C.A. 9, 1944), 144 F. (2d) 195, 199, this Court sustained a finding of uncleanliness at a candy factory where the inspectors had observed insanitary conditions at the plant "at times not far removed from the date of manufacture of the candy."

In *Berger v. U. S.*, (C.A. 8, 1952), 200 F. (2d) 818, 823, the Court said at pages 823-824:

> "There is no dispute that the shipments involved in Counts One and Two were made on May 3 and May 17, 1951, respectively. The evidence describing the conditions on May 21, 22, and 23, in some particulars justified an inference that those conditions had existed for a considerable period of time. But there was additional and more direct evidence of what the conditions were in the plant at the time the shipments in question were canned and shipped. The analysis of

> the contents of the seized shipments showed that the jars contained, in addition to pickle relish, fragments of a fly skin, part of a fly's leg, a number of mites, part of a beetle wing, a moth scale, fragments of feathers and fragments of rodent hair. The evidence was not insufficient to support the verdict."

Here, too, as we have shown, the moth contamination in the finished products was directly correlated with the moth infestation at the plant. Note also *U. S. v. 44 Cases . . . Viviano Spaghetti, etc.*, (E.D. Ill, 1951), 101 F. Supp. 658, 662-663, where the Court ruled that insanitary factory conditions observed on October 11, 13, and 16, 1950, had prevailed on September 8, September 30, and October 9, 1950, when the products there in question were shipped interstate.

We submit that the trial court had ample reason to conclude that the inspectors in this case had acted with every circumspection and courtesy, that their testimony was completely honest and unbiased, that they were highly competent observers, and that their testimony was directly relevant to the issues of the case and admissible.

D. 21 U.S.C. 342(a) (4), WHICH DECLARES A FOOD TO BE ADULTERATED IF IT IS PREPARED, PACKED, OR HELD UNDER INSANITARY CONDITIONS WHEREBY IT MAY HAVE BECOME CONTAMINATED WITH FILTH, IS NOT VOID FOR UNCERTAINTY.

Appellants challenge the constitutionality of 21 U.S.C. 342(a) (4). (Appellants' Br., 15-26). This issue was neither presented to nor passed upon by the trial court, nor was it included in the "Statement of Points Upon Which Appellants Intend to Rely." (R. 312-315). Such questions will ordinarily not be considered on appeal. *Hoyt v. Clancey*, (C.A. 8, 1950), 180 F. (2d) 152, 154; *Rogers v. Union Pac. R. Co.*, (C.A. 9, 1944), 145 F. (2d) 119, 127; *Lyons v. U. S.*, (C.A. 6, 1941), 123 F. (2d) 507, 508.

On the merits, however, this very question was thoroughly considered in the case of *Berger v. U. S.* (C.A. 8, 1952), 200 F. (2d) 818, which upheld the constitutionality of Section 342(a) (4). We quote at some length the cogent language of this opinion:

Pages 821-822

> "It is clear that the congressional intent is to make it a criminal offense for a person to prepare, pack or hold food under such insanitary conditions that it may become contaminated. It is not necessary that it actually become contaminated. Stated in the language of Chief Justice

Stone in *Corn Products Refining Co. v. Federal Trade Commission,* 324 U.S. 726, 738, 65 S.Ct. 961, 967, 89 L.Ed. 1320, the statute is designed to prevent adulterations 'in their incipiency' by condemning insanitary conditions which *may* result in contamination.

"It is clear from an examination of *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399, 34 S.C. 337, 58 L. Ed. 658; *Standard Fashion Co. v. Magrane-Houston Co.* 258 U.S. 346, 42 S.Ct. 360, 66 L.Ed. 653, and *Corn Products Refining Co. v. Federal Trade Commission,* supra, that the clause—'whereby it may have become contaminated'—is not to be construed to mean that criminality may be predicated upon proof of an insanitary condition which gives rise to a 'mere possibility' of contamination. The condition condemned by the statute, which must be proved to support a conviction, is one which would with reasonable possibility result in contamination. *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 46, 68 S.Ct. 822, 92 L.Ed. 1196. Such construction placed upon the words 'which may render such articles injurious to health' resulted in the statute being impervious to attack on constitutional grounds. *United States v. Lexington Mill & Elevator Co.*, supra. This is also true of the statute now under consideration.

* * *

"It is contended that because the statute leaves open for determination the *degree* of insanitation which would possibly or probably result in contamination, it does not meet the test of definiteness. Or, as the argument was put in *Nash v. United States*, 229 U.S. 373, 33 S.Ct. 780, 781, 57 L. Ed. 1232, estimates of the degree of dirtiness and lack of sanitation which would probably or with reasonable possibility bring about the prohibited result might differ and a

man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men. But the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. The criterion of criminality is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct.

* * *

"The argument is advanced that the statute is void for indefiniteness and uncertainty because it contains no definition of 'insanitary conditions' and without such a definition no intelligent person can tell in advance when a condition violates the statute. We do not agree. The terms 'insanitary conditions' and 'contaminated' are descriptive terms commonly used and understood. True, there are degrees of insanitary conditions, some worse than others. And there are degrees of contamination. But both define a condition. And as as heretofore demonstrated, the fact that a statute contains in its definition an element of degree as to which estimates may differ does not result in unconstitutional indefiniteness or uncertainty. When the terms 'insanitary conditions' and 'contaminated' are read with the qualifying word 'filth', all become possessed with a more definite meaning. Impossible standards of specificity are not required. *Jordan v. DeGeorge*, supra. It is difficult to think of a more apt way to say that one should not prepare food under conditions whereby it would probably be filthy. Any reasonably intelligent person should know what that means. The statute is not subject to this attack."

The *Berger* case refers to *U. S. v. Lexington Mill & Elevator Co.*, 232 U.S. 399 (1914), where the

Supreme Court interpreted a provision in the Food and Drugs Act of 1906 which declared a food to be adulterated "If it contains any added poisonous or other added deleterious ingredient *which may render such article injurious to health.*" (Italics added). The Court said at page 411:

> "It is not required that the article of food containing added poisonous or other added deleterious ingredients must affect the public health, and it is not incumbent upon the Government in order to make out a case to establish that fact. The act has placed upon the Government the burden of establishing, in order to secure a verdict of condemnation under this statute, that the added poisonous or deleterious substances must be such as may render such article injurious to health. The word 'may' is here used in its ordinary and usual signification, there being nothing to show the intention of Congress to affix to it any other meaning. It is, says Webster, 'an auxiliary verb, qualifying the meaning of another verb, by expressing ability . . . contingency or liability, or possibility or probability.' . . . If it cannot by any possibility, when the facts are reasonably considered, injure the health of any consumer, such flour, though having a small addition of poisonous or deleterious ingredients, may not be condemned under the Act. *This is the plain meaning of the words* . . . (Italics added)."

Appellants argue that the words "insanitary conditions" are uncertain so that they would have to guess as to their meaning. (Appellants' Br. 23-24). Then they seek to implement this argument by referring to the testimony of Mr. Morris J. Hubert of the

Quartermaster Corps who thought the conditions at the plant were sanitary. But Mr. Hubert was not a sanitary inspector. (R. 265). His duties were to go to the plant, obtain samples of finished products, and check the markings and packaging of the products. (R. 263). He testified that at the plant "we always look around," but he did not make an inspection even for the purpose of determining whether there was anything oustandingly wrong with respect to sanitation. (R. 265). His testimony that the plant was sanitary was properly ordered stricken and this ruling is not challenged here. (R. 265-266).

That appellants fall back on the testimony of Mr. Hubert in an effort to show differences "even among men who are experts in the field of sanitary inspection" (Appellants' Br. 24) is indicative of the thinness of their argument.

Certainly, the live and dead moth infestation at the plant, in various stages of development such as larvae, pupae, webbing, and adult moths—in the flour storage bins, on the walls, in the flour conveying machinery, in the drying room and on the drying trays, in the enrichment tank, and in direct contact with the food—comprised insanitary conditions whereby the food might have become contaminated with filth.

It is clear that the statutory language attacked

by appellants sets up a standard of cleanliness in food manufacturing plants sufficiently definite for any reasonable person to avoid offending its requirements.

E. MISCELLANEOUS POINTS.

1. The Individual Defendant Was Criminally Responsible

Appellants assert that the individual defendant, Paskey Dedomenico, was not physically present at the plant when the shipments in question were made, and they urge that he cannot be held responsible for those shipments. (Appellants' Br. 50-63).

Mr. Dedomenico was president of the corporation (Golden Grain Macaroni Co.) and general manager of its Seattle plant. (R. 23; 284). He was the final authority and in over-all charge of the plant, including shipping, sales, and production, and he spent the major part of his time there. (R. 295).

On June 28, 1951, he left for San Francisco and he returned on July 25. (R. 284). It may be noted that the cut macaroni involved in Count 2 was manufactured and packed during the week of June 17-23, 1951 (Appellants' Br. 2), *before Mr. Dedomenico left for San Francisco.* Samples of this cut macaroni, identified as No. 30-340 L and examined by chemists for both sides, revealed more serious contamination than most of the other samples. (See Appendices A and B).

The elbow macaroni involved in Count 5 and the thin spaghetti involved in Count 6 were manufactured and packed during the week of July 22, 1951, and they were shipped on July 26 (Appellants' Br. 3), *the day after Mr. Dedomenico returned.* Mr. Elliott's analysis of the thin spaghetti, Sample No. 29-478 L, showed that this shipment had the largest count of insect and larva fragments. (Appendix A).

But it is settled that the criminal responsibility of a corporate officer or general manager of a firm does not hinge upon his physical presence or participation in the violative acts. *U. S. v. Dotterweich,* 320 U. S. 277, 281-285 (1943); *U. S. v. Kaadt et al.,* (C.A. 7, 1948), 171 F. (2d) 600, 604; *U. S. v. Parfait Powder Puff Co.,* (C.A. 7, 1947), 163 F. (2d) 1008, 1009-1010, cert. den. 332 U.S. 851.

In the *Dotterweich* case, Dotterweich was the president and general manager of the Buffalo Pharmacal Co., Inc. Both Dotterweich and the corporation were prosecuted under the Federal Food, Drug, and Cosmetic Act for the interstate shipment of adulterated drugs. Dotterweich was convicted but the jury disagreed as to the corporation. The opinion of the Court of Appeals [*U. S. v. Buffalo Pharmacal Co., Inc.,* (C.A. 2, 1942), 131 F. (2d) 500] sets forth the facts more fully. On page 501, the Court of Appeals said:

"*The appellant Dotterweich had no personal connection with either shipment,* but he was in general charge of the corporation's business and had given general instructions to its employees to fill orders received from physicians." (Italics added).

While the Court of Appeals felt that Dotterweich's conviction could not be upheld, the Supreme Court reversed and sustained the conviction. We quote some of the language in the Supreme Court's opinion:

320 U.S. 280

"The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection. Regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words."

320 U.S. 281

"Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in a responsible relation to a public danger."

320 U.S. 284-285

"To speak with technical accuracy, under §301 a corporation may commit an offense and all persons who aid and abet its commission are equally guilty. Whether an accused shares responsibility in the business process resulting in unlawful distribution depends on the evidence

> produced at the trial and its submission—assuming the evidence warrants it—to the jury under appropriate guidance. The offense is committed, unless the enterprise which they are serving enjoys the immunity of a guaranty, by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws, namely, to put into the stream of interstate commerce adulterated or misbranded drugs. Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrong-dong be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless."

We submit that here, as in the *Dotterweich* case, there was sufficient evidence to support the trial court's conclusion as to the criminal responsibility of the individual defendant.

2. Appellants Were Not In Double Jeopardy

The food involved in Count 3 is elbow macaroni. The food involved in Count 4 is spaghetti. Both of these foods were shipped to the same consignee on the same date and under the same bill of lading. Appellants contend that the interstate movement of these two foods comprises but one offense and they seem to argue that their conviction on both Counts is "double jeopardy." (Appellants' Br. 30-35). A similar contention is made with respect to Counts 5 and 6.

This issue was neither presented to nor passed upon by the trial court, nor was it specified in the "Statement of Points Upon Which Appellants Intend to Rely." Under such circumstances, the appellate court will generally not consider the question. (See the authorities cited for the same proposition at the outset of Part D of this Argument). Moreover, it would appear that appellants have waived whatever rights they may have had in this respect. In *Levin et al. v. U. S.*, (C.A. 9, 1925), 5 F. (2d) 598, cert. den. 269 U. S. 562, this Court said at page 600:

> "It is uniformly held that the constitutional immunity from second jeopardy is a personal privilege, which may be waived, that the waiver may be either express or implied, that it is always implied when there is failure to raise the objection at the first opportunity, and that it comes too late when raised for the first time on motion in arrest of judgment."

See also *U. S. v. Coy*, (W.D. Ky., 1942), 45 F. Supp. 499, 501, and cases there cited. And in *Brewster v. Swope*, (C.A. 9, 1950), 180 F. (2d) 984, 986, this Court suggested that an accused waives his right to claim double jeopardy when he files a motion for a new trial. Appellants here also filed a Motion for a New Trial. (R. 308).

However, on the merits, we turn first to the statute:

"21 U.S.C. 331. Prohibited Acts

"The following acts and the causing thereof are hereby prohibited:

"(a) The introduction or delivery for introduction into interstate commerce of *any* food, drug, device, or cosmetic that is adulterated or misbranded." (Italics added).

Thus it is clear the statute forbids the introduction of *any* adulterated food into interstate commerce.

The adulterated food referred to in Count 3 was elbow macaroni. The adulterated food referred to in Count 4 was spaghetti. Obviously, these are two separate foods, each having a characteristic size and shape, and each requiring special manufacturing and drying equipment. Thus, spaghetti is dried on sticks while elbow macaroni is dried on trays. (R. 66-67).

Moreover, separate proof was required and was produced to establish the alleged violative character of each food. (Note Appendices A and B showing that both chemists made separate analysis for each food). It is our contention that the introduction of each of these separate foods into interstate commerce in an adulterated condition constituted a separate offense, and that it was immaterial whether they were shipped at the same time, on the same bill of lading, and to the same consignee.

In *Berg v. U. S.*, (C.A. 9, 1949), 176 F. (2d) 122, cert. den. 338 U. S. 876, the defendant was convicted on seven counts of making false entries in records kept by a common carrier. Separate sentence was imposed on each count. Each count dealt with a separate false entry, but at least six of the seven false entries were made in the same report. (See opinion of District Court, 79 F. Supp. 1021). Rejecting appellant's argument that there was but one offense, this Court said at pages 125-126:

> "The falsification of the several entries was punishable in each instance as a separate crime. Each entry required proof of additional facts, in order to establish the separate crime, whether made on the same report or different reports."

Note also *Bower v. U. S.*, (C.A. 9, 1924), 296 Fed. 694, cert. den. 266 U.S. 601, where this Court sustained another "false entry" conviction, stating on pages 695-696:

> "The statute prohibits the making of any false entry, not the making of a false report, and each false entry constitutes a separate and distinct crime, even though the several entries are made on the same day and contained in the same statement or report."

The analogy to the instant case is manifest. Section 331 (a) prohibits the introduction of any adulterated food into interstate commerce, *not the introduction of any shipment of adulterated foods.*

The precise question as to the number of offenses that may arise under the Federal Food, Drug, and Cosmetic Act of 1938 out of one shipment of different items has not, to our knowledge, been discussed in any reported opinion. [11A] Under the Food and Drugs Act of 1906, however, there were two cases which dealt with this point.

In *U. S. v. Direct Sales Co.* (S.D. N.Y., 1918), 252 Fed. 882, the defendant was charged in 14 Counts with making one interstate shipment of seven different drugs, each alleged to be both adulterated and misbranded. Upon conviction, defendants contended there was but one offense and there should be but one penalty. The statute then before the Court read in part:

> "Any person who shall ship * * * any such article so adulterated or misbranded * * * shall be guilty of a misdemeanor * * *"

The trial court held there were 14 offenses, stating at page 883:

> "According to this (statute), the article is clearly specified as the unit of the offense, as

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[11A] But note *Barnes et al v. U. S.*, (C.A. 9, 1944), 142 F. (2d) 648, where this Court sustained the conviction and imposition of separate penalties on Counts 3 and 4 of an information though both Counts related to a single consignment of tablets which were both adulterated and misbranded.

> distinguished from the shipment, and as there were seven different articles in the shipment, and each was both adulterated and misbranded, it would seem that there were fourteen separate and distinct violations of the act, for which separate penalties may be imposed."

On the other hand, in *U. S. v. Watson-Durand-Kasper Grocery Co.*, (D. Kans., 1917), 251 Fed. 310, the Court ruled that a seven-count Information regarding the interstate shipment of 250 pails of adulterated "confectionery" spelled out but one offense. The facts are not entirely clear. While there is some reference to the candy being "variously labeled," there seems to have been but one shipment of *one food* —namely, confectionery.

Appellants seem to suggest that in a seizure action under 21 U.S.C. 334(a) to condemn adulterated macaroni and adulterated spaghetti that were shipped at the same time, the Court would make no distinction between the two products and would condemn both though the Government's proof established only that the macaroni was adulterated. (Appellants' Br. 34). This is absurd on its face. Appellants cite *A. O. Andersen & Co. v. U. S.*, (C.A. 9, 1922), 284 Fed. 542 and *U. S. v. 935 Cases * * * Tomato Puree,* (N.D. Ohio, 1946), 65 F. Supp. 503. Neither of these cases supports appellants' proposition.

In the *Andersen* case, there was only *one food*

under seizure—canned salmon. This Court's common sense ruling was that the Government did not have to open every can of salmon to prove that the entire lot should be condemned.[12] A representative sampling would be sufficient.

The *Tomato Puree* case also involved but *one food* and the Court's ruling was similar to that in the *Andersen* case.

We submit that even if the double jeopardy question were properly before this Court, there is no basis for appellants' position since each Count involved a separate food.

3. The Fines Imposed Are Within the Statutory Limits and Not Subject to Attack On Review

The trial court sentenced the corporate defendant to pay a fine of $5000. (R. 14). The individual defendant was also sentenced to pay a fine of $5,000 and then was placed on probation with respect to imposition of sentence as to imprisonment. (R. 15-16).

Appellants now say that "*the fine is so excessive* as to indicate abuse of discretion on the part of the trial judge." (Appellants' Br. 64-65). Presumably, appellants refer to both fines.

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[12] Obviously, if the Government opened every can before trial, there would remain no *res* over which to litigate.

The applicable rule relating to appellate review of the sentence imposed by the trial court is clear. In *Tomoya Kawakita v. U. S.*, (C.A. 9, 1951), 190 F. (2d) 506, aff'd 343 U.S. 717—where the death sentence had been pronounced—this Court said at page 528, citing many authorities:

> "No legal error is committed in imposing a severe sentence so long as it does not exceed the maximum set by statute."

In the instant case, defendants had been previous convicted under the Federal Food, Drug and Cosmetic Act for the interstate shipment of food adulterated within the meaning of Section 342(a) (4) in that it had been prepared, packed, and held under insanitary conditions whereby it may have become contaminated with filth. (Plaintiff's Ex. 27). Because of such prior conviction, the maximum penalty which could have been imposed for each offense was "imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine." [21 U.S.C. 333(a)].

Each defendant here was convicted on five counts which, as we have demonstrated, specified five separate offenses. Consequently, each defendant was subject to a total maximum fine of $50,000. In view of the prior conviction and the scope of defendants' operations—which was known to the Court not only

from the testimony but also from the visit which the Court made to the plant at defendants' request (R. 282)—, it cannot seriously be urged that a fine of $5,000 on each defendant, one-tenth of the maximum, was excessive. Certainly, the fine imposed was well within the statutory maximum.

Defendants had obviously been making only a stab at sanitation by imposing clean-up duties on employees heavily burdened with their regular work. (R. 68). By sentencing defendants as it did, the Court hoped to focus attention on the need "to employ a man solely for the purpose of guarding against these conditions. They simply did not keep their house in good order." (R. 304).

4. The Trial Court Committed No Error in Its Rulings On the Filth Question

Appellants complain that the trial court refused "to admit testimony" and "to consider argument on the question 'What is filth'." (Appellants' Br. 49-50, 42-43).

But appellants do not point to any instances where the court excluded *competent testimony* regarding the meaning of filth or the presence of filth in their premises and products. In fact, defense counsel was permitted a wide scope of interrogation on these very points. (R. 165; 243-244; 275-276; 278).

As the basis for their complaint, appellants point to that place in the Record where the trial court interrupted defense counsel's argument on the motion for acquittal at the close of the Government's case in chief. (R. 181-182; Appellants' Br. 42-43). There, counsel was arguing a question of law as to the meaning of the term "filth." The trial court was fully informed on this legal point and stated it did not care to hear further argument on it. The Court also remarked that "filth is to be taken in its ordinary accepted term," citing *U. S. v. Lazere*, 56 F. Supp. 730 (R. 181). Since appellants agree that this is the correct interpretation of the word (Appellants' Br. 39), there was and is no room for argument.

The scope of argument on questions of law is wholly discretionary with the trial court. As was observed in *State v. Meyers*, (Sup. Ct. Oregon, 1910), 110 Pac. 407, 410:

> "If the court thought itself sufficiently advised as to the law, it had the right to refuse to hear counsel further."

VII

CONCLUSION

For the foregoing reasons, the Judgments of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX A

ANALYTICAL FINDINGS OF ROBERT T. ELLIOTT

Count No.	Name of Food	Sample No.	Amount of Sample Used	Findings	Record Reference
2	Cut Macaroni	30-340 L	3 lbs.	62 larva or insect fragments, moth scales rodent-hair fragments....	156
3	Elbow Macaroni	29-871 L	2 lbs.	24 insect or larva fragments, 1 larva capsule (part remaining from head of a worm), 1 insect egg, moth scales....	156-157
4	Spaghetti	29-872 L	1 lb.	14 insect or larva fragments, moth scales.....	158
5	Elbow Macaroni	29-477 L	3 lbs.	17 insect or larva fragments, 1 small rodent hair, moth scales.....	158-159
6	Thin Spaghetti	29-478 L	3 lbs.	70 insect or larva fragments, 1 larva capsule, 1 rodent hair moth scales.....	159-160

APPENDIX B

ANALYTICAL FINDINGS OF JOHN SPINELLI

Count No.	Name of Food	Sample No.	Amount of Sample Used	Findings**	Record Reference
2	Cut Macaroni	30-340 L	½ lb.*	6 insect fragments, couple of pieces of larvae, some gritty particles	235
3	Elbow Macaroni	29-871 L	½ lb.	8 insect fragments mold	236-237
4	Spaghetti	29-872 L	½ lb.	3 insect fragments.....	237
5	Elbow Macaroni	29-477 L	½ lb.	5 insect fragments some gritty particles....	237
6	Thin Spaghetti	29-478 L	½ lb.	5 insect fragments some particles of grit..	239, 237

* Mr. Spinelli stated he examined 225 grams from each sample. This is slightly less than ½ lb.

** Mr. Spinelli testified, without identifying the particular sample, that he found a moth scale or part of a moth in one sample. (R. 259).

APPENDIX C

Public Law 217 — 83rd Congress

Chapter 350 — 1st Session

H. R. 5740

AN ACT

To amend the Federal Food, Drug and Cosmetic Act, so as to protect the public health and welfare by providing certain authority for factory inspection, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 704 of the Federal Food, Drug, and Cosmetic Act, as amended (21 U. S. C., sec. 374) is amended to read as follows:

Federal Food, Drug, and Cosmetic Act, amendments. 52 Stat. 1057. 67 Stat. 476. 67 Stat. 477.

"FACTORY INSPECTION

"Sec. 704. (a) For purposes of enforcement of this Act, officers or employees duly designated by the Secretary, upon presenting appropriate credentials and a written notice to the owner, operator, or agent in charge, are authorized (1) to enter, at reasonable times, any factory, warehouse, or establishment in which food, drugs, devices, or cosmetics are manufactured, processed, packed, or held, for introduction into interstate commerce or are held after such introduction, or to enter any vehicle being used to transport or

hold such food, drugs, devices, or cosmetics in interstate commerce; and (2) to inspect, at reasonable times and within reasonable limits and in a reasonable manner, such factory, warehouse, establishment, or vehicle and all pertinent equipment, finished and unfinished materials, containers, and labeling therein. A separate notice shall be given for each such inspection, but a notice shall not be required for each entry made during the period covered by the inspection. Each such inspection shall be commenced and completed with reasonable promptness.

"(b) Upon completion of any such inspection of a factory, warehouse, or other establishment, and prior to leaving the premises, the officer or employee making the inspection shall give to the owner, operator, or agent in charge a report in writing setting forth any conditions or practices observed by him which, in his judgment, indicate than any food, drug, device, or cosmetic in such establishment (1) consists in whole or in part of any filthy, putrid, or decomposed substance, or (2) has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health. A copy of such report shall be sent promptly to the Secretary.

"(c) If the officer or employee making any such inspection of a factory, warehouse, or other establishment has obtained any sample in the course of the inspection, upon completion of the inspection and prior to leaving the premises he shall give to the owner, operator, or agent in charge a receipt describing the samples obtained.

"(d) Whenever in the course of any such inspection of a factory or other establishment where food is manufactured, processed, or packed, the officer or employee making the in-

spection obtains a sample of any such food, and an analysis is made of such sample for the purpose of ascertaining whether such food consists in whole or in part of any filthy, putrid, or decomposed substance, or is otherwise unfit for food, a copy of the results of such analysis shall be furnished promptly to the owner, operator, or agent in charge."

Sec. 2. Section 301 of such Act (21 U.S.C., sec. 331) is amended by 52 Stat. 1042, adding at the end thereof the following new paragraph:

Use of reports or analysis

"(n) The using, in labeling, advertising or other sales promotion of any reference to any report or analysis furnished in compliance with section 704."

Sec. 3. Section 304 (c) of such Act (21 U.S.C., sec. 334) is amended (52 Stat. 1045) to read as follows:

PUBLIC LAW 217

All 67 Stat. 477. *Seized Goods. Sample.*

"(c) The court at any time after seizure up to a reasonable time before trial shall by order allow any party to a condemnation proceeding, his attorney or agent, to obtain a representative sample of the article seized and a true copy of the analysis, if any, on which the proceeding is based and the identifying marks or numbers, if any, of the packages from which the samples analyzed were obtained."

Approved August 7, 1953.